



12-1-1958

Universal Ideal of Justice and Our Immigration Laws

Jack Wasserman

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Jack Wasserman, *Universal Ideal of Justice and Our Immigration Laws*, 34 Notre Dame L. Rev. 1 (1958).

Available at: <http://scholarship.law.nd.edu/ndlr/vol34/iss1/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE UNIVERSAL IDEAL OF JUSTICE
AND OUR IMMIGRATION LAWS*Jack Wasserman**

Mr. Chief Justice Warren recently observed that:

Ever since Hammurabi published his code to 'hold back the strong from oppressing the weak,' the success of any legal system is measured by its fidelity to the universal ideal of justice.¹

In evaluating any statute enacted by Congress, one might well ask whether the law is just or fair and how it measures up to our Anglo-American concept of the universal ideal of justice. Laws imbued with this ideal will be neither arbitrary nor discriminatory. They will respect the dignity of man, the sanctity of his marriage relationship and the unity of his family. They will recognize the principle of forgiveness and the necessity of procedural fairness. Finally, they will avoid vague and ambiguous standards and proclaim their mandate with clarity, directness and simplicity. The objective of this article will be to analyze our immigration statutes in the light of this universal ideal of justice — an ideal which incorporates other ideals — those of equality, reasonableness, fairness, respect for family life, and clarity as well as simplicity.

I. THE IDEAL OF EQUALITY^o

In 1947 the President's Committee on Civil Rights observed:

The central theme in our American heritage is the importance of the individual person. From the earliest moment of our history we have believed that every human being has an essential dignity and integrity which must be respected and safeguarded. Moreover, we believe that the welfare of the individual is the final goal of group life. Our American heritage further teaches that to be secure in the rights he wishes for himself, each man must be willing to respect the rights of other men. This is the conscious recognition of a basic moral principle: all men are created equal as well as free. . . . This concept of equality which is so vital a part of the American heritage knows no kinship with notions of human uniformity or regimentation. We abhor the totalitarian arrogance which makes one man say that he will respect another man as his equal only if he has 'my race, my religion, my political views, my social position.' In our land men are equal, but they are free to be different. From these differences among our people have come the great human and national strength of America. . . . We can tolerate no restrictions upon the individual which depend upon irrelevant factors such as his race, his color, his religion or the social position to which he is born.²

* LL.B. Harvard. Member of the District of Columbia and New York Bars. Former Member of the Board of Immigration Appeals, Department of Justice. Past-president, Association of Immigration and Nationality Lawyers. Vice Chairman, Immigration Committee of the American Bar Association.

¹ Warren, *The Law and the Future*, *Fortune*, Nov. 1955, p. 124.

² 1947 REPORT OF PRESIDENT'S COMMISSION ON CIVIL RIGHTS 4.

The ideal of equality has permeated our thinking in our United Nations activities. We led the fight over Russian objections for the adoption of the Universal Declaration of Human Rights which declares, *inter alia*, that the right to freedom of movement and residence within a state shall be enjoyed "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."³

Our American heritage of equality has given us prestige among the nations of the world and a strong feeling of pride at home.⁴ However, our heritage and our aspirations have fallen short of our goals in relation to our immigration laws.

Originally only white persons were qualified for naturalization.⁵ Aliens of African descent became eligible in 1870⁶ but it was not until 1940 that our native born Indian and the Eskimo were granted permission to seek naturalization.⁷ Recognition of the international aspects of our discriminatory laws led to the removal of barriers of citizenship ineligibility from those of Chinese origin in 1943,⁸ those of Filipino and East Indian origin in 1946,⁹ and those of Japanese, Korean and all other races in 1952.¹⁰ Thus, today we have achieved equality in our naturalization laws. Neither national origin, race, nor place of birth restrict an alien seeking naturalization in the land of freedom and equality. Our immigration laws, however, have not kept pace with our naturalization provisions.

Hostility and intolerance directed against the Chinese and a feeling that they were racially inferior led to the barring of Chinese immigrant laborers for a ten year period in 1882.¹¹ With subsequent modifications and extensions, the exclusion of Chinese remained national policy until 1943.¹² In 1917 aliens of an area known as the barred zone, described by degrees of latitude and longitude, were declared inadmissible to the United States solely by reason of the accident of their birth in the territories included within this area.¹³ The primary purposes of this barred-zone provision were to exclude

³ U.N. UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 2. See art. 13.

⁴ REPORT OF PRESIDENT'S COMMISSION, *op. cit. supra* note 2 at 9.

⁵ Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103.

⁶ Act of July 14, 1870, ch. 254, § 7, 16 Stat. 256.

⁷ Nationality Act of 1940, ch. 876, § 303, 54 Stat. 1140. See Gordon, *The Racial Barrier to American Citizenship*, 93 U. PA. L. REV. 237 (1945).

⁸ Act of Dec. 17, 1943, ch. 344, § 3, 57 Stat. 601. See Gordon, *Our Wall of Exclusion Against China*, 3 LAW. GUILD REV. 3, 7 (1943).

⁹ Act of July 2, 1946, ch. 534, § 1, 60 Stat. 416. In 1950 persons of Guamanian descent became eligible. Act of Aug. 1, 1950, ch. 512, § 4(b), 64 Stat. 385.

¹⁰ 66 Stat. 239, 8 U.S.C. § 1422 (1952).

¹¹ Chinese Exclusion Act of 1882, ch. 126, § 1, 22 Stat. 58.

¹² The Chinese Exclusion Act of 1882 was amended in 1884, Act of July 5, 1884, ch. 220, § 1, 23 Stat. 115, and repealed, but replaced in 1888, Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476. It was extended for another ten years in 1892, Act of May 5, 1892, ch. 60, § 1, 27 Stat. 25, and was re-affirmed in 1902, Act of April 29, 1902, ch. 641, § 1, 32 Stat. 176, and in 1904, Act of April 27, 1904, ch. 1630, § 5, 33 Stat. 428. It was finally repealed in 1943, Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

¹³ Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 876. The barred-zone provision rendered inadmissible natives of parts of China, all of India, Burma, Siam, the Malay States, a small part of the Soviet Union, part of Arabia, part of Afghanistan, most of the Polynesian Islands and the East Indian Islands. Excepted by a box cut out of the area were natives of Persia, natives of a part of Afghanistan and a part of Russia.

Hindus and to make the exclusion of Asiatics more complete. In 1922 Dr. Harry H. Laughlin of the Eugenics Record Office of the Carnegie Institute of Washington was appointed by the House Immigration Committee to study the biological aspects of immigration. His report to the House Committee, together with a rising feeling of isolationism and anti-alien antagonism, is credited with considerable influence in the enactment of the Immigration Act of 1924.¹⁴ Dr. Laughlin concluded that recent immigrants present a higher percentage of inborn socially inadequate qualities than do the older stocks.¹⁵ The report was widely criticized and has been generally discredited.¹⁶ The 1924 Immigration Act restricted the admission of aliens to the United States upon the basis of quotas computed according to the census of 1890,¹⁷ and rendered inadmissible for permanent residence all, including Japanese, who were racially ineligible for American citizenship.

The 1924 Act produced a sharp conflict, and was the subject of divergent congressional reports. Secretary of State Hughes called the Immigration Committee's attention to the objections of Japan that the incorporation of a provision excluding those ineligible for citizenship violated the Gentlemen's Agreement with Japan¹⁸ as well as treaty provisions, and that it would undo the work of the Washington Conference on Limitation of Armaments.¹⁹ He also indicated that the use of 1890 as a census base would be likely to offend Italy, Roumania and other countries which considered the legislation "as an unjust discrimination, de facto if not de jure, enacted to the detriment of a friendly nation." The majority of the House Committee rejected these protests, concluded that our immigration policy was a domestic issue, and that the bill was not inconsistent with any treaty provisions or agreements. In its report, the majority stated that the racial status quo in the United States had to be preserved, and that the arrival in great numbers of unassimilable aliens from the southern and eastern part of Europe tended "to upset our balance of population, to depress our standard of living, and to unduly charge our institutions for the care of the socially inadequate."²⁰ A vigorous minority report was filed charging that the bill was confessedly discriminatory in its operation, and that it imposed an arbitrary and adventitious test not in keeping with the traditions of our national policy. In the words of the report:²¹

The obvious purpose of this discrimination, however much it may now be disavowed, is the adoption of an unfounded anthropological

¹⁴ Ch. 190, 43 Stat. 153. See GARIS, IMMIGRATION RESTRICTION 239-40 (1927).

¹⁵ *Hearings Before the House Committee on Immigration, America's Modern Melting Pot*, 67th Cong., 3rd Sess. 729 (1922), ser. 7-c (1923).

¹⁶ Gillam, *Statistics and the Immigration Problem*, 30 AMERICAN J. OF SOCIOLOGY 29 (1924-25); Jennings, *Undesirable Aliens*, 51 SURVEY 309 (1923); Kirkpatrick, *Selective Immigration*, 3 J. OF SOCIAL FORCES 497 (1925).

¹⁷ The 1924 quotas for each year were limited to two percentum of the number of foreign born of each nationality resident in the United States as determined by the census of 1890. No quotas were given to nationals of countries ineligible for citizenship and no quota limitations were imposed upon persons born in the Western Hemisphere. An alien's quota was determined by place of birth except for Asiatics whose quotas were determined by racial origin.

¹⁸ Under the Gentlemen's Agreement with Japan, that country voluntarily undertook to check emigration to the United States. GARIS, *op. cit. supra* note 14, at 312.

¹⁹ The 1924 Immigration Act was regarded as a deliberate insult by the Japanese people and serious anti-American feeling was aroused in Japan. *Id.*, at 341-51.

²⁰ H.R. REP. No. 350, 68th Cong., 1st Sess., pt. 1, at 13-14 (1924).

²¹ *Id.*, pt. 2, at 4-16.

theory that the nations which are favored are the progeny of the fictitious and hitherto unsuspected Nordic ancestors, while those discriminated against are not classified as belonging to that mythical ancestral stock. No scientific evidence worthy of consideration was introduced to substantiate this pseudoscientific proposition. It is pure invention and the creation of a journalistic imagination. All we know is that these immigrants are all human beings and none of them is regarded by the majority of the committee as undesirable as long as they meet the test of the Act of 1917.

....

The suggestion contained in the majority report, that the adoption of the 1890 census would accomplish an equitable apportionment between immigration originating in northern and western Europe and that emanating from southern and eastern Europe is based on a palpable injustice. . . . It likewise ignores the important consideration that it has been our proud boast that hitherto we have not distinguished between men because of their race, creed, or nationality.

....

We of the minority make no distinction between the various geographical divisions of Europe and entertain no prejudice against the various nationalities. We seek to judge men by their inherent worth and the manner in which they perform the duties of life.

Our American heritage of equality notwithstanding, the basic philosophy of the 1924 Immigration Law remains as part of our national policy today. With minor changes, it is the law of the land in the form of the McCarran-Walter Act, otherwise known as the Immigration and Nationality Act of 1952.²² We no longer exclude Asiatics upon the ground that they are racially inadmissible. However, we do restrict immigration from Far Eastern countries upon the basis of small racial quotas. Asiatics born in any part of the world are admissible to the United States under such limitations. People other than Asiatics are chargeable to quotas not on the basis of race but on the basis of place of birth and national origin.²³ Western Hemisphere countries have no quota limitations with two exceptions.²⁴ Asiatics are kept under a racial quota, as noted above, and Western Hemisphere natives of colonies of European countries are chargeable to small colonial quotas rather than to the quota of the mother country.²⁵

No other democratic country in the world has as stringent or discriminatory immigration laws as the United States. England, China, Sweden,

²² 66 Stat. 163, 8 U.S.C. §§ 1101-1503 (1952). The annual quota of any quota area is 1/6 of 1 percentum of the inhabitants in the continental United States in 1920. Presidential Proclamations set forth the various quotas. Proc. No. 2980, 66 Stat. c36, 8 U.S.C. 373 (1952), as amended, Proc. No. 3147, 70 Stat. c48 (1956), 8 U.S.C. (Supp. V 1958), as amended, Proc. No. 3158, 71 Stat. c10 (1956), 8 U.S.C. (Supp. V 1958), as amended, Proc. No. 3188A, 71 Stat. c42 (1957), 8 U.S.C. 280 (Supp. V 1958) as amended, Proc. No. 3206, 8 U.S.C. 280 (Supp. V 1958).

²³ 66 Stat. 176, 8 U.S.C. § 1152 (1952). H.R. REP. No. 1365, 82d Cong., 2d Sess. 37 (1952).

²⁴ 66 Stat. 169, 176, 8 U.S.C. §§ 1101(a) (27) (c), 1152(a) (1952).

²⁵ 66 Stat. 177, 8 U.S.C. § 1152(c) (1952). This provision was aimed at curtailing negro immigration from the West Indies and is new with the 1952 Act. H.R. REP. No. 1365, *op. cit. supra* note 23, at 38. Congressman Powell charged in the House debates:

This bill sets up a Cape Town—Washington, D.C. axis. . . . This bill makes this no longer a land of the free, but a place only for Anglo-Saxons. It is racial discrimination, Mr. Author, because this bill removes from emigrating to the United States the only group that does come here who are Negroes, the people of the West Indies.

98 CONG. REC. 4435, 4439 (1952). See also S. REP. No. 1137, 82 Cong., 2d Sess., pt. 2, at 5 (1952).

France and Russia do not have quota limitations, nor laws which exclude aliens because of race or nationality.²⁶ Alfred E. Smith, former Governor of New York, one-time Democratic Presidential candidate, and a leading Catholic layman, wrote in November 1933:

I am fully aware of the persuasive arguments for cutting down unrestricted immigration into this country. I have always suspected, however, that some of the more drastic provisions of our laws and some of the national quotas which were established were fixed on the basis of fantastic Aryan theories rather than American principles.²⁷

Former Commissioner of the Immigration and Naturalization Service, Earl G. Harrison, observed upon his retirement that the racial barriers and discriminations in our immigration laws were in harmony with the theories of Nazi Germany.²⁸ Congressman Powell, in like vein complaining about the 1952 Act states: "The 1924 law early achieved notoriety for the racist sentiments which engendered it and the Ku Klux Klan support which insured its passage. The McCarran-Walter bills perpetuate this obvious racist discrimination. . . ."²⁹

Theories of racial superiority and the concept of a master Aryan race monopolizing social and intellectual values should have been buried with Hitler. We have taken steps to remove all racial and national discriminations from our naturalization laws. The process of removing these cancer sores of inequality from the statute books should be made complete. All barriers in the immigration laws based on race and all discriminations against nations should be removed. They represent undemocratic theories, repugnant to American traditions and inconsistent with our international declarations. We can remodel our immigration laws and retain yearly numerical limitations without discriminatory standards.³⁰ In so doing, we will promote friendlier relations between the United States and other nations and fulfill the promise that we shall treat all men as created equal.

II. THE IDEAL OF REASONABLENESS

Throughout the centuries, man has suffered under despotic and arbitrary laws. "At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life."³¹ The despotism of unreasonable laws has always earned the moral indignation of history. The cruelty of the Draconian laws led people to say that they were "written not in ink, but in blood."³² The in-

²⁶ See FRAZER, *CONTROL OF ALIENS IN THE BRITISH COMMONWEALTH OF NATIONS* (1940); MAC-KENZIE, *LEGAL STATUS OF ALIENS IN PACIFIC COUNTRIES* (1937). Very few countries in the Western Hemisphere have quota laws.

²⁷ Smith, *Can We Make Room for the Refugees?*, New Outlook, Nov. 1933, p. 9.

²⁸ Department of Justice, Press Release, July 20, 1944.

²⁹ 98 CONG. REC. 4438 (1952) (remarks of Congressman Powell).

³⁰ Proposals to this effect were made by former Senator Lehman in 1955, S. 1206, 84th Cong., 1st Sess. (1955), and by Congressman Celler in 1957, H.R. 3364, 85th Cong., 1st Sess. (1957). President Eisenhower complained in his State of the Union Address on February 2, 1953 that: "Existing legislation contains injustices. It does in fact discriminate." Nevertheless the bill proposed to Congress by the Attorney General on January 31, 1957 would restrict quotas according to four geographical areas, maintaining a modified form of discrimination.

³¹ *United States v. Wunderlich*, 342 U.S. 101 (1951) (dissenting opinion of Justice Douglas).

³² MOREY, *ANCIENT PEOPLES* 128 (Countryman ed. 1943).

justices of the French legal system under Louis XVI brought about the French Revolution and eventually a democratic France. Arbitrary laws produced our American Revolution, and led to our present constitutional system of government. The American tradition of a nation built up by immigrants should make us realize that we should not treat the alien in our midst unreasonably. Nevertheless, early in our history, Congress enacted the unpopular and short-lived Alien Act of June 25, 1798 providing for the arbitrary expulsion of dangerous aliens.³³ The 1952 Immigration and Nationality Act is said to rival the notorious Alien Act of 1798 in spirit and unpopularity.³⁴ Several guiding principles incorporated into our present law have been productive of severe criticism. Re-examination of these principles would seem appropriate if we are to strengthen our democratic processes.

A. *Ex Post Facto* Provisions

Prior to 1940³⁵ we had never attempted to deport aliens under retroactive legislation. Under the 1952 Immigration Act all classes of deportable aliens are retroactively subject to expulsion.³⁶ Aliens who committed non-deportable offenses in 1925 and 1938 have been ordered deported after 1952 solely by reason of the *ex post facto* operation of our present immigration laws.³⁷ Many students of constitutional law believe that the *ex post facto* prohibition of our Constitution is applicable to civil as well as to criminal legislation.³⁸ The Supreme Court, however, has refused to apply this constitutional prohibition to deportation statutes because of their civil nature.³⁹ Whether retroactive deportation legislation is civil or criminal, and, therefore, within or without the bounds of the Constitution, is not nearly as important as whether such type of enactment is fair and reasonable. Retroactive laws "are generally deemed unfair, because, in the nature of the case, the person, or persons, involved in the behavior to which such a law relates, can have had no notice, when the behavior took place, of such an after-made law that applies to it."⁴⁰ This is particularly applicable to expulsion statutes, for

33 Act of June 25, 1798, ch. 58, 1 Stat. 570. MILLER, *CRISIS IN FREEDOM; THE ALIEN AND SEDITION ACTS 52-54*, 193 (1951); KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW 46-47* (1946). No alien was ever deported under this law. *Ibid.*

34 The 1952 law has been assailed as an "affront to the conscience of America" (Rev. Walter Van Kirk, 1952 HEARINGS BEFORE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 1508), "worthy of Stalin and not of America" (Walter P. Reuther, *id.* at 1622), "a nefarious discriminatory measure" (Brooklyn Borough President Cashmore, N.Y. Times, Oct. 13, 1952, p. 11, col. 2.), "a betrayal of our American Traditions" (Senator Kefauver and Governor Averill Harriman, N.Y. Times, Oct. 13, 1952, p. 10, col. 2.), and "a bacchanalia of meanness" (Professors Henry M. Hart, Jr. and Louis L. Jaffe of the Harvard Law School, 1952 HEARINGS, *supra* at 1575).

35 Under Act of June 28, 1940, ch. 439, 54 Stat. 670, former members of the Communist Party were made deportable by retroactive legislation enacted in 1940. See *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

36 66 Stat. 208, 8 U.S.C. § 1251(d) (1952).

37 *Lehmann v. Carson*, 353 U.S. 692 (1957); *Mulcahy v. Catalanotte*, 353 U.S. 692 (1957); *Marcello v. Bonds*, 349 U.S. 302 (1955).

38 1 CROSSKEY, *POLITICS AND THE CONSTITUTION* 324 (1953); De Witt, *Are Legal-Tender Laws Ex Post Facto?*, 15 POL. SCI. Q. 96 (1900); McALLISTER, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CALIF. L. REV. 269, 270 (1927).

39 *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Galvan v. Press*, 347 U.S. 522 (1954); *Marcello v. Bonds*, 349 U.S. 302 (1955).

40 1 CROSSKEY, *op. cit. supra* note 37, at 324.

"deportation can be the equivalent of banishment or exile"⁴¹ and "may result also in loss of both property and life; or of all that makes life worth living."⁴² However euphemistically deportation may be regarded in the dichotomy between the civil and the criminal law, the fact remains that it is a penalty⁴³ and a dreadful punishment⁴⁴ which should not be imposed retroactively. Some countries, like Norway, Mexico, Portugal and Brazil, have express constitutional provisions forbidding all retroactive laws.⁴⁵ The unfairness of ex post facto civil laws which impose penalties as drastic as deportation should lead us, as a matter of common decency, to forbid retroactive expulsion of aliens.

B. *Statutes of Limitations Restricting Deportation*

Under the Immigration Act of 1891 aliens who entered in violation of law were made subject to deportation for a period of one year after arrival.⁴⁶ The 1903 Immigration Act increased this period of limitations to three years⁴⁷ and the 1917 Immigration Act⁴⁸ raised the period to five years for most deportable offenses, eliminating, however, all limitations for criminal and subversive grounds of deportation. The 1924 quota law provided no statutes of limitations for those who entered without proper visas or for those who overstayed.⁴⁹ The McCarran-Walter Act has whittled the pre-existing five year limitations under the 1917 Act so that a mere skeleton of token time periods restrict deportation proceedings today.⁵⁰

The statutes of limitations enacted in the several states and by the federal government are justified as a matter of necessity and convenience. They are designed to spare the courts and individuals from litigation of stale claims "after memories have faded, witnesses have died or disappeared, and evidence has been lost."⁵¹ Immigration proceedings are not spared from these stale claims under existing law. Thus the alien and the government are forced into litigation involving the legality of an entry in 1922⁵² or the existence or non-existence of an entry into the United States by a six-month-old boy in 1906.⁵³

In some countries, such as Peru, an alien's admission for permanent residence exempts him from deportation. In Brazil, aliens who are married to

⁴¹ Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947).

⁴² Ng Fung Ho v. White, 259 U.S. 276, 285 (1922).

⁴³ Jordan v. De George, 341 U.S. 223 (1951).

⁴⁴ United States *ex rel.* Klonis v. Davis, 13 F.2d 630 (2d Cir. 1926).

⁴⁵ 2 DODD, MODERN CONSTITUTIONS 141-42, 175 (1900); 1 DODD, *op. cit. supra* at 153.

⁴⁶ Act of March 3, 1891, ch. 551, § 11, 26 Stat. 1086.

⁴⁷ Act of March 3, 1903, ch. 1012, § 21, 32 Stat. 1218.

⁴⁸ Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889.

⁴⁹ Act of May 26, 1924, ch. 190, 43 Stat. 153.

⁵⁰ Under the 1952 Immigration Act in four instances grounds of deportation must have occurred "within five years after entry." These are 1) institutionalization at public expense for mental disease, 66 Stat. 204, 8 U.S.C. § 1251(a)(3) (1952); 2) conviction for a single crime involving moral turpitude, 66 Stat. 204, 8 U.S.C. § 1251(a)(4) (1952); 3) public charges; 66 Stat. 206, 8 U.S.C. § 1251(a)(8) (1952); and 4) conviction for violation of Title I of the Alien Registration Act of 1940, 66 Stat. 207, 8 U.S.C. § 1251(a)(15) (1952). These limitations, particularly those regarding mental disease and economic distress, were provided "in accord with humanitarian principles." H.R. REP. NO. 2096, 82d Cong., 2d Sess. 129 (1952).

⁵¹ Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945). See also Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938).

⁵² In the Matter of A, 6 I. & N. Dec. 540 (1955).

⁵³ In the Matter of Hoffman, Immigration File A-5,955, 899.

citizens and who are responsible for the support of citizen children may not be deported. The most common statute of limitations in foreign countries is a five-year period.⁵⁴

Under United States criminal statutes persons committing crimes not punishable by death are generally protected by a five-year statute of limitations.⁵⁵ Arson, robbery, burglary, forgery, perjury, white slave traffic, assault with a deadly weapon, and larceny are punishable only if criminal proceedings are brought within a five-year period.

The President's Commission on Immigration and Naturalization, recommending a ten-year limitation⁵⁶ on all deportation proceedings, observed:

That it is wrong to keep the threat of punishment indefinitely over the head of one who breaks the law is a principle deeply rooted in the ancient traditions of our legal system. The law requires that criminal prosecutions, except for capital offenses, such as murder and treason, be brought within a fixed period of time or not at all. A similar dispensation governs the enforcement of civil liabilities.⁵⁷

President Eisenhower has likewise recognized that fairness requires the incorporation of a general statute of limitations in our present law.⁵⁸ A just, equitable and humanitarian law does not remove statutes of limitations. It retains them.

C. Reasonable Standards

Under the McCarran-Walter Act, grounds of exclusion and deportation rest in many instances upon the "opinion" or "satisfaction" of immigration or consular employees.⁵⁹ Aliens are excludable when, in the opinion of consuls or the Attorney General, they are likely to become public charges,⁶⁰ or when such officials have reason to believe that they seek to come here to engage in prejudicial conduct⁶¹ or subversive activities.⁶² Aliens are also subject to deportation when, "in the opinion of the Attorney General," they have become public charges within five years after entry,⁶³ or when their marriages have been annulled and they fail to establish to the satisfaction of the Attorney General that the marriages were not contracted to evade our immigration laws.⁶⁴ "Heretofore, for the most part, deportation and exclusion have rested upon finding of fact made upon evidence . . . [T]he change from objective findings to subjective feelings is not compatible with our system of justice."⁶⁵ It has transformed our immigration system from a government of laws to the absolutism of a governmental bureaucracy of men. Equally appalling are the

⁵⁴ U.N., STUDY ON EXPULSION OF IMMIGRANTS (1955).

⁵⁵ 18 U.S.C. § 3282 (1952).

⁵⁶ See H.R. REP. NO. 1312, 79th Cong., 1st Sess. 16 (1945) for similar recommendation.

⁵⁷ 1952 REPORT OF PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, *Whom We Shall Welcome*, 197-98.

⁵⁸ Letter From President Dwight D. Eisenhower to Senator Arthur V. Watkins, April 6, 1953, Item 8.

⁵⁹ Subjective standards are employed in over 80 provisions. 98 CONG., REC. 5112, 5154 (1952) (remarks of Senator Lehman).

⁶⁰ 66 Stat. 183, 8 U.S.C. § 1182(a)(15) (1952).

⁶¹ 66 Stat. 184, 8 U.S.C. § 1182(a)(27) (1952).

⁶² 66 Stat. 186, 8 U.S.C. § 1182(a)(29) (1952).

⁶³ 66 Stat. 206, 8 U.S.C. § 1251(a)(8) (1952).

⁶⁴ 66 Stat. 208, 8 U.S.C. § 1251(c) (1952); cf. *Karayannis v. Brownell*, 251 F.2d 882 (D.C. Cir. 1957).

⁶⁵ *President Truman's Veto Message*, H.R. Doc. 520, 82d Cong., 2d Sess. 7 (1952).

government's asserted exercise of arbitrary detention powers over aliens under the 1952 Act.⁶⁶ Aliens are excludable and deportable for the admission of the essential elements of crimes involving moral turpitude.⁶⁷ Under this provision power is given to "minor immigration and consular officials to act as prosecutor, judge, and jury in determining whether acts constituting a crime have been committed."⁶⁸ Equally objectionable are the provisions authorizing the Attorney General to exclude or deport any alien who has engaged, or has had a purpose to engage, in activities "prejudicial to the public interest" or "subversive to the national security."⁶⁹

No standards or definitions are provided to guide discretion in the exercise of powers so sweeping. To punish undefined 'activities' departs from traditional insistence on established standards of guilt. To punish an undefined 'purpose' is thought control.

These provisions are worse than the infamous Alien Act of 1798, passed in a time of national fear and distrust of foreigners, which gave the President power to deport any alien deemed 'dangerous to the peace and safety of the United States.' Alien residents were thoroughly frightened and citizens much disturbed by that threat to liberty.

Such powers are inconsistent with democratic ideals. Conferring power like that upon the Attorney General is unfair to him as well as our alien residents. Once fully informed of such vast discretionary powers vested in the Attorney General, Americans now would and should be just as alarmed as Americans were in 1798 over less drastic powers vested in the President.⁷⁰

D. *Exclusion and Deportation of Rehabilitated Aliens*

In 1917, when medical science was still in the horse and buggy era, Congress determined to exclude aliens who had one previous attack of insanity.⁷¹ Today, although great advances have been made in diagnosing, treating and curing the mentally ill, we still arbitrarily exclude aliens who have had an attack of insanity, no matter how mild, no matter how far distant and no matter how complete the alien's recovery or rehabilitation.⁷² No discretionary authority exists to waive this ground of exclusion for aliens seeking permanent residence, although discretion does exist to waive criminal, immoral, or tubercular disabilities where the applicants for admission have resident spouses or children here.⁷³ Former members of the Communist Party who have seen the light and renounced their unhappy past are not forgiven their sins for entry purposes unless they can show active opposition against communism "to the satisfaction of the Attorney General."⁷⁴ Past nominal members of the Communist Party have been subjected to costly and

⁶⁶ *United States ex rel. Heikkinen v. Gordon*, 190 F.2d 16 (8th Cir. 1951), *dismissed as moot*, 344 U.S. 870 (1952); *United States ex rel. Pirinsky v. Shaughnessy*, 177 F.2d 708 (2d Cir. 1949); *Ex parte Sentner*, 94 F. Supp. 77 (E.D. Mo. 1950).

⁶⁷ 66 Stat. 182, 8 U.S.C. § 1182(a)(9) (1952).

⁶⁸ H.R. Doc. No. 520, *op. cit. supra* note 65, at 5-6.

⁶⁹ 66 Stat. 184, 186, 206, 8 U.S.C. §§ 1182(a)(27), 1182(a)(29), 1251(a)(7) (1952).

⁷⁰ H.R. Doc. No. 520, *op. cit. supra* note 65, at 6.

⁷¹ Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 875.

⁷² 66 Stat. 182, 8 U.S.C. § 1182(a)(3) (1952).

⁷³ 71 Stat. 640 (1957), 8 U.S.C. § 1182(b) (Supp. V, 1958).

⁷⁴ 66 Stat. 186, 8 U.S.C. § 1182(a)(28)(I) (1952).

lengthy deportation prosecutions.⁷⁵ Forgiveness is likewise restricted for rehabilitated aliens with criminal records. They may be pardoned only where they have resident spouses or children and the Attorney General determines to exercise his discretion favorably because of extreme hardship and the public interest.⁷⁶

Judge Panken's observations in *Zy v. Zy*,⁷⁷ might be noted here to assist us in framing a more worthy approach to this problem. He said:

Sinners are not condemned to sin in perpetuity. They are not condemned to sin throughout their lives because they had sinned. Since man has risen to the high cultural stature which is his, rehabilitation, reformation of the delinquent has become his objective.

... Sin is not always the result of a will to sin. Education, environment or lack of education are not infrequently responsible for the sin committed. Economic disadvantage sometimes causes sin to be committed. The sinner is to be helped to rehabilitate himself. To refuse help to such is sinful.⁷⁸

An alien's past should be overlooked if he has been completely rehabilitated. His past, whether it be a life of crime, immorality, mental illness or improper affiliation should remain buried — if the alien himself is no longer in league with it. This would be in conformity with accepted notions of reasonableness which would likewise eliminate *ex post facto* provisions, prescribe a fair statute of limitations and remove arbitrary standards from our immigration statute.

III. THE IDEAL OF FAIRNESS

A. *Hearing Procedures*

In a recent address at the Harvard Law School, Professor Bernard Schwartz decried the shocking manner in which federal governmental agencies operate, despite procedural safeguards which are adequate in theory but not in practice.⁷⁹

Theoretically, most federal agencies⁸⁰ comply with the Administrative Procedure Act,⁸¹ which was designed to bring a greater degree of justice and fairness to the procedures of the fourth branch of government, the administrative agencies. Separation of investigatory and prosecuting operations from quasi-judicial functions, as well as completely independent hearing officers, are required by that act.⁸² The commingling of these functions permitted on behalf of agencies prior to the date of the Administrative Procedure Act was considered highly undesirable. The deportation hearing was considered "a perfect exemplification of the practices so unanimously condemned."⁸³

⁷⁵ *Rowoldt v. Perfetto*, 355 U.S. 115 (1957); *Latva v. Nicholls*, 106 F. Supp. 658 (D. Mass. 1952). See Letter From President Dwight D. Eisenhower to Senator Arthur V. Watkins, April 6, 1953.

⁷⁶ 71 Stat. 640, 8 U.S.C. § 1182(b) (Supp. 1957).

⁷⁷ 13 N.Y.S.2d 415 (Dom. Rel. Ct. 1939).

⁷⁸ *Id.* at 419-20.

⁷⁹ See Harvard Law School Record, April 3, 1958.

⁸⁰ See agencies listed in 1957 OFFICE OF ADMINISTRATIVE PROCEDURE ANN. REP. 12-14.

⁸¹ 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1952).

⁸² 60 Stat. 240, 241, 244 (1946), 5 U.S.C. §§ 1004(c), 1006(c), 1010 (1952).

⁸³ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45 (1949).

The Department of Justice which sponsored the Administrative Procedure Act⁸⁴ found it a highly meritorious safeguard for every agency except its own Immigration and Naturalization Service. First, it opposed application of the act to immigration controversies in the courts.⁸⁵ It then secured exemption from the act for immigration matters under special legislation⁸⁶ by representations that utilization of separate hearing and prosecuting officers in immigration cases would require more personnel and more money with an immediate expenditure of \$3,980,000 and eventually up to \$30,000,000.⁸⁷ This consideration undoubtedly influenced Congress to continue this exemption in the 1952 Immigration Act⁸⁸ over the protests of many organizations, including the American Bar Association.⁸⁹ However, the Immigration Service has now discovered that its representations about the costs of two-men hearings were grossly exaggerated. As a result of hearings before the House Committee on Government Operations, exposing procedural shortcomings in the efficiency of the Immigration Service, examining officers were assigned first to all important deportation cases⁹⁰ and then to all contested cases to represent the interests of the government.⁹¹ With efficiently revised immigration procedures permitting aliens to plead to orders to show cause,⁹² the Immigration Service has been able to function in immigration proceedings with two men — an examiner and a hearing officer, known as a special inquiry officer. The result has been a reduction of personnel and expense.⁹³ No excuse therefore remains for non-compliance with the Administrative Procedure Act, except the unwillingness of the Immigration Service to subject itself to the fair procedures of the act. The need for compliance as a matter of fairness is still pressing.

A contested immigration hearing can be, and sometimes is, a one-sided, anti-alien star chamber proceeding. Notice of charges are not given in exclusion hearings.⁹⁴ In deportation proceedings charges amounting to vague generalities are sometimes supplied. The alien cannot ask for a bill of particulars, nor can he examine witnesses before his administrative trial. Pre-trial discovery and subpoena powers are not available to him at this stage.⁹⁵

⁸⁴ S. Doc. No. 248, 79th Cong., 2d Sess. 249 (1946).

⁸⁵ *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1949).

⁸⁶ Act of Sept. 27, 1950, ch. 1052, ch. III, § 101, 64 Stat. 1048.

⁸⁷ *Hearings on Supplemental Appropriations Bill for 1951 Before the Appropriations Committee of the House*, 81st Cong., 2d Sess. 375 (1950); *Hearings on Supplemental Appropriations for 1951 Before the Appropriations Committee of the Senate*, 81st Cong., 2d Sess. 752-53 (1950).

⁸⁸ 66 Stat. 208, 8 U.S.C. § 1252 (1952); *Marcello v. Bonds*, 349 U.S. 302 (1954).

⁸⁹ *Hearings on S. 716, H.R. 2379, and H.R. 2816 Before the Joint Subcommittees of the Committees on the Judiciary*, 82d Cong., 1st Sess. 526 (1951).

⁹⁰ House Comm. on Government Operations, *Practices and Procedures of the Immigration and Naturalization Service in Deportation Proceedings*, H.R. REP. 1458, 84th Cong., 1st Sess. 14 (1955).

⁹¹ 1955 IMMIGRATION AND NATURALIZATION SERVICE REP. 18; Department of Justice, Press Release, Aug. 9, 1955; 21 Fed. Reg. 97-102 (1956); 8 C.F.R. §§ 242.9(b), 242.16(c) (1958).

⁹² 8 C.F.R. § 241.1 (1958).

⁹³ 1957 ATT'Y GEN. ANN. REP. 442-43.

⁹⁴ Due process would require such notice for an alien who has been lawfully admitted and is seeking re-entry. *Chew v. Colding*, 344 U.S. 590 (1952); *Malaxa v. Brownell*, Civil No. 922-56, D.D.C., Dec. 7, 1955; *U.S. ex rel. Malaxa v. Brownell*, 139 F. Supp. 143 (S.D. Fla. 1956).

⁹⁵ 66 Stat. 199, 8 U.S.C. § 1225(a) (1952) authorizes immigration officials to subpoena the attendance of witnesses and the production of books relating to any person's right to enter or remain in the United States. See *Shaughnessy v. Bacolas*, 135 F. Supp. 15 (S.D.N.Y. 1955).

His opponent, the Immigration Service, on the other hand, has all these pre-trial remedies. Witnesses can be subpoenaed and statements taken under oath. The subpoena power can be enforced by judicial sanctions.⁹⁶ That there is power to question aliens seeking entry is unquestioned. Whether aliens may be required to give testimony against themselves is not clear from the statutory language of the McCarran-Walter Act.⁹⁷ In any event, it is common practice for immigration officials to take recorded statements from applicants for admission and from deportees who are often without legal representation and not even advised of their right to counsel.⁹⁸ Thus, the Immigration Service has all the advantages of pre-trial discovery. The alien has none. The Service can be fully prepared for hearing. The alien cannot.

At the hearing the same unfairness prevails. The alien is almost always the first witness called by the Immigration Service so that he may be trapped into inconsistencies before hearing the adverse testimony. The Immigration Service represented by an immigration inspector exercises subpoena powers without restriction,⁹⁹ and without advising the alien in advance of who will be called. The alien, on the contrary, must file a written application for a subpoena with the presiding inspector who issues it only when the materiality of the prospective witness' testimony is demonstrated. The written application is then filed with the alien's immigration file in the possession of the inspector who is also the alien's adversary. Thus, the alien's opponent has advance notice of his witnesses, a privilege denied to him. Production of documents is easily accomplished by the alien's opponent, the Immigration Service. For the alien, however, favorable documents in the government's possession are often withheld upon the ground of privilege, whether they relate to the merits or to cross-examination.¹⁰⁰

By law and by regulations, having the force and effect of law,¹⁰¹ special inquiry officers, in deportation¹⁰² and exclusion proceedings¹⁰³ are required to conduct fair and impartial hearings. There are, however, obvious limitations upon these special inquiry officers who are subject to the administrative supervision of superior officers who exercise prosecuting and investigatory functions.

What special inquiry officer will issue a subpoena for the testimony of his District Director, Regional Commissioner or the Commissioner of the Immigration and Naturalization Service who can transfer, promote and

⁹⁶ 66 Stat. 199, 8 U.S.C. § 1225(a) (1952). Compare the practices of the Immigration Service with the present and proposed practices of other agencies in this field. 1957 OFFICE OF ADMINISTRATIVE PROCEDURE ANN. REP. 41.

⁹⁷ Cf. *United States v. Minker*, 350 U.S. 179 (1955).

⁹⁸ 8 C.F.R. § 242.10 (1958). The practice had been sustained by the courts prior to the 1952 Act. *Low Wah Suey v. Backus*, 225 U.S. 460, 469-79 (1912); *Ex parte Vilarino*, 50 F.2d 582 (9th Cir. 1931). The 1952 Act, however, expressly gives an alien the right to counsel in deportation and exclusion cases. 66 Stat. 235, 8 U.S.C. § 1362 (1952).

⁹⁹ 66 Stat. 198, 8 U.S.C. § 1225(a) (1952).

¹⁰⁰ This procedure is contrary to recent judicial rulings. *Communist Party of the United States v. Subversive Activities Control Board*, 254 F.2d 314 (D.C. Cir. 1958); *Petrowicz v. Holland*, 142 F. Supp. 369 (E.D. Pa. 1956).

¹⁰¹ *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1953).

¹⁰² *Sardo v. McGrath*, 196 F.2d (D.C. Cir. 1952); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1949).

¹⁰³ *O'Connell ex rel. Kwong Han Foo v. Ward*, 126 F.2d 615 (1st Cir. 1942).

demote him? Special inquiry officers frequently deny an alien's request to adjourn a hearing. You will seldom see them deny the government's request for a postponement. I have read decisions of such officers criticizing an alien and his counsel but have yet to see a decision in which such criticism was leveled at the Immigration Service or its representatives. Is the type of system which produces this state of affairs one of complete fairness and impartiality?

The disadvantages to the alien of unilateral pre-trial discovery and anti-alien hearing procedures are not required by the McCarran-Walter Act. They are the product of administrative instructions. They can and should be remedied.

Special inquiry officers are the trial judges over our immigration laws. Full impartiality, however, is psychologically impossible for these trial judges until they have complete independence by appointment pursuant to section 11 of the Administrative Procedure Act¹⁰⁴ and thorough divestment from the administrative control of the Immigration Service.

B. *Use of Confidential Information*

On April 10, 1958, the Solicitor General acknowledged before the Supreme Court that an American citizen had a constitutional right to travel abroad, but that such right might be abrogated by denial of a passport based upon confidential information.¹⁰⁵ The use of confidential information against citizens in passport cases, in loyalty controversies involving governmental employment,¹⁰⁶ and in merchant seamen cases¹⁰⁷ illustrates the proposition that "aliens are often merely the initial victims of restraints subsequently applied to citizens."¹⁰⁸

It was against aliens that confidential information was first utilized extensively. During World War II, regulations were published in November, 1941 to authorize the Attorney General to exclude aliens without hearings upon the basis of secret information.¹⁰⁹ The power to exclude without a hearing on undisclosed information was intended to be utilized in exceptional and extraordinary spy cases where the Attorney General believed disclosure would be against the public interest.¹¹⁰ Unfortunately, this wartime device has become a permanent part of our peacetime immigration procedures¹¹¹ and has been utilized extensively to exclude European refugees,¹¹² war

¹⁰⁴ 60 Stat. 244, 5 U.S.C. § 1010 (1952). This section requires the Civil Service Commission to fix the qualifications of special inquiry officers and determine their salary and tenure.

¹⁰⁵ *Dayton v. Dulles*, 357 U.S. 145 (1958).

¹⁰⁶ *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1950).

¹⁰⁷ *Parker v. Lester* 227 F.2d 708 (9th Cir. 1955).

¹⁰⁸ *BARTH, THE LOYALTY OF FREE MEN* (1951). Mr. Chief Justice Warren, dissenting in *Jay v. Boyd*, 351 U.S. 345 (1956), said:

If sanction of this use and effect of 'confidential' information is confirmed against this petitioner an alien by a process of judicial reasoning, it may be recognized as a principle of law to be extended against American citizens in a myriad of ways. *Id.* at 362.

¹⁰⁹ 12 Fed. Reg. 5142 (1947).

¹¹⁰ 1952 HEARINGS BEFORE THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 13.

¹¹¹ 66 Stat. 199, 8 U.S.C. § 1225(c) (1952).

¹¹² *Hearings Before the Senate Judiciary Committee on Bills to Amend the Displaced Persons Act of 1948*, 81st Cong., 1st & 2d Sess. 664-65 (1949-1950).

brides¹¹³ and returning residents,¹¹⁴ as well as countless Canadians¹¹⁵ and South Americans who seek to come here as visitors on legitimate business or pleasure trips. It is utilized not only in exclusion cases but also in cases involving adjustment of an alien's status to that of a permanent resident upon grounds of hardship¹¹⁶ and under the Refugee Relief Act of 1953.¹¹⁷ Stays of deportation¹¹⁸ upon the ground that an alien might be physically persecuted in the place of deportation are likewise determined on the basis of off-the-record material.¹¹⁹ The sorry part of this extensive utilization of non-record information by our immigration authorities is that it is reliance upon the rankest and lowest form of rumor and hearsay. It is merely "hearsay evidence, which could not be gotten in the record,"¹²⁰ or evidence whose source is no longer available and which could not withstand attack at a hearing.¹²¹

Significantly, where adverse publicity or stinging Supreme Court dissents disturbed the Attorney General, he determined that nondisclosure was no longer in the public interest and accorded the alien involved a traditional on-the-record hearing.¹²²

It is small wonder, therefore, that such sharp criticisms have been leveled at the nondisclosure of confidential information.

Security is like liberty in that many are the crimes committed in its name. . . . In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddling, and the corrupt to play the role of informer undetected and uncorrected.¹²³

113 *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1949). Exclusions without a hearing have been disapproved by the American Bar Association. 8 AD. BULL. 7-8 (1955).

114 *Chew v. Colding*, 344 U.S. 590 (1952); *Shaughnessy v. Mezei*, 345 U.S. 206 (1952).

115 The adverse information against Canadians is often in the form of hearsay reports supplied by the Royal Canadian Police. Although there is a requirement that nondisclosure of confidential information be predicated on the public interest, it is questionable whether such prerequisite exists in these cases.

116 66 Stat. 214, 8 U.S.C. § 1254(a)(2) (1952); *Jay v. Boyd*, 351 U.S. 345 (1956). After the *Jay v. Boyd* decision, the Immigration Commissioner restricted the use of confidential information in this type of case by the promulgation of new regulations. 8 C.F.R. § 242.17(c) (1958).

117 67 Stat. 403 (1953), 50 U.S.C. § 1971(d) (Supp. V 1958); *Chao Li Chi v. Murff*, 250 F.2d 854 (2d Cir. 1957), *cert. denied*, 356 U.S. 919 (1958).

118 66 Stat. 214, 8 U.S.C. § 1253(h) (1952).

119 See *United States ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392, 395 (2d Cir. 1953), *cert. denied*, 345 U.S. 928 (1953).

120 *Hearings Before the Subcommittee on Legal and Monetary Affairs of the House Committee on Government Operations on Practices and Procedures of the Immigration and Naturalization Service in Deportation Proceedings*, 84th Cong., 1st Sess. 18,67 (1955).

121 *Hearings Before the Senate Judiciary Committee*, *supra* note 111.

122 After excluding Ellen Knauff without a hearing, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the Attorney General granted her a hearing which resulted in her clearance. KNAUFF, THE ELLEN KNAUFF STORY (1952). Ignatz Mezei was denied a hearing at first, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), but was granted one and released on parole. Cecil Jay was denied suspension of deportation on off the record evidence, *Jay v. Boyd*, 351 U.S. 345 (1956). After this last Supreme Court decision, the Immigration Commissioner adopted a more restrictive policy concerning the use of such materials. 8 C.F.R. § 242.17 (1958). In numerous rehearings under the new regulations the aliens have been cleared.

123 *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (dissenting opinion of Justice Jackson).

Or as stated by Justice Douglas in *Peters v. Hobby*:¹²⁴ "When we relax our standards to accommodate the faceless informer, we violate our basic constitutional guarantees and ape the tactics of those whom we despise."

Justice Black, dissenting in *Jay v. Boyd*,¹²⁵ emphatically stated his opinion of nondisclosure of confidential information: "No amount of legal reasoning by the Court and no rationalization that can be devised can disguise the fact that the use of anonymous information to banish people is not consistent with the principles of a free country." Addressing himself to the same question, Justice Frankfurter, also dissenting in *Jay v. Boyd*,¹²⁶ said:

President Eisenhower has explained what is fundamental in any American code. A code devised by the Attorney General for determining human rights cannot be less than Wild Bill Hickok's code in Abilene, Kansas:

'It was: . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose.' Press release of remarks of the President, on November 23, 1953, on receiving America's Democratic Legacy Award at dinner on the occasion of the 40th anniversary of the Anti-Defamation League.

Practices and procedures under our immigration law in utilizing confidential information violate the fundamental American code described by the President. The Immigration Service should suffer the penalties an outraged citizenry will impose.

IV. THE IDEAL OF RESPECT FOR FAMILY RELATIONSHIPS

In 1936 the Commissioner of the Immigration and Naturalization Service found close to three thousand cases pending in the department which were of such "incredibly cruel family separations . . . so repugnant to every American principle of justice and humanity" that deportation was temporarily stayed so that Congress might take some action.¹²⁷ Four years later, statutory authorization was granted to suspend the deportation¹²⁸ of any alien who (a) proved good moral character for the preceding five years; (b) had a citizen or resident spouse, parent or minor child who would suffer serious economic hardship if the alien were deported; (c) was not racially inadmissible or ineligible for naturalization; and (d) was not subject to deportation on criminal, mental, physical, narcotic or subversive charges.¹²⁹ In 1948 this deportation suspension section of the law was amended¹³⁰ to

¹²⁴ 349 U.S. 331, 352 (1955).

¹²⁵ 351 U.S. 345, 367 (1956) (dissenting opinion). See also *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955); *Alexiou v. McGrath*, 101 F. Supp. 421 (D.D.C. 1951); *Maeztu v. Brownell*, 132 F. Supp. 751 (D.D.C. 1955); *Orahovats v. Brownell*, 134 F. Supp. 84 (D.D.C. 1955); *Boudin v. Dulles*, 136 F. Supp. 218 (D.D.C. 1955).

¹²⁶ 351 U.S. 345, 372-73 (1956) (dissenting opinion).

¹²⁷ H.R. Misc. Doc. No. 392, 74th Cong., 2d Sess. 5 (1935).

¹²⁸ When suspension of deportation is granted, the alien's status is changed from an illegal resident to that of a lawful and permanent resident. Congressional approval, however, is required in these cases.

¹²⁹ Act of June 28, 1940, ch. 439, § 20, 54 Stat. 672.

¹³⁰ Act of July 1, 1948, ch. 783, 62 Stat. 1206.

permit racially ineligible aliens to qualify as well as those aliens without family ties who arrived here on or before July 1, 1948 and who had seven years residence. These provisions of the law were criticized upon the ground that an alien could enter the United States illegally, acquire a wife and children or long residence and remain.¹³¹ To remedy this so-called abuse, Congress eliminated the previous statutory provisions¹³² and provided new standards.¹³³ These all but abolish the concept of suspending deportation for those with family ties. The restrictions include:

1. Entry into the United States after June 27, 1950 is a prerequisite (except for those deportable on certain criminal,¹³⁴ narcotic,¹³⁵ subversive¹³⁶ or immoral¹³⁷ grounds.)¹³⁸ Thus, at present the statute presents the incongruous result of precluding suspension to those who entered without documents or overstayed prior to June 27, 1950 but allowing it for criminals, narcotic violators, subversives and prostitutes.¹³⁹

2. Continuous physical presence in the United States is required for a five or ten¹⁴⁰ year period. If the statute is read literally, an hour in Mexico during this period, or even presence on board an American vessel may break the alien's continuity of physical presence.¹⁴¹

3. A final order of deportation entered under the McCarran-Walter Act prior to the application for suspension precludes relief. If this means that our authorities are prevented from vacating a prior order of deportation in order to grant this discretionary relief,¹⁴² then their previous mistake or changed circumstances are not to be given consideration. This would be a harsh, senseless and arbitrary rule of law.

4. Good moral character is required for the statutory period of five or ten years. No one can quarrel with this requirement. However, the act contains arbitrary standards precluding the establishment of good moral character. A man who has been jailed for traffic violations for one hundred and eighty days or convicted of playing poker during the statutory period cannot be regarded as a person of good character.¹⁴³

5. Aliens who are natives of a contiguous territory or of an adjacent island and who are eligible for entry outside the quota¹⁴⁴ are not eligible for

¹³¹ S. REP. No. 1515, 81st Cong., 2d Sess. 600 (1950).

¹³² The previous legal requirements with modifications were continued under Act of June 27, 1952, ch. 477, § 244, 66 Stat. 214 until December 24, 1957 when they expired.

¹³³ 66 Stat. 214, 215, 8 U.S.C. §§ 1254(a)(2)-(a)(5) (1952).

¹³⁴ 66 Stat. 204, 8 U.S.C. §§ 1251(a)(4)-(a)(5) (1952); 66 Stat. 207, 8 U.S.C. §§ 1251(a)(16)-(a)(17) (1952).

¹³⁵ 66 Stat. 206, 8 U.S.C. § 1251(a)(11) (1952).

¹³⁶ 66 Stat. 205, 206, 8 U.S.C. §§ 1251(a)(6)-(a)(7) (1952).

¹³⁷ 66 Stat. 207, 208, 8 U.S.C. §§ 1251(a)(12), 1251(a)(18) (1952).

¹³⁸ For those in the four enumerated groups ten years physical presence is required and the date of entry is immaterial.

¹³⁹ Congressman Walter is seeking to remedy this defect by the enactment of H.R. 11874, 85th Cong., 2d Sess. (1958).

¹⁴⁰ 66 Stat. 214, 215, 8 U.S.C. §§ 1254(a)(2)-(a)(3) (1952) require five years physical presence. 66 Stat. 215, 8 U.S.C. §§ 1254(a)(4)-(a)(5) (1952) require ten years physical presence.

¹⁴¹ See *Montalban v. Brownell*, 157 F. Supp. 391 (D.D.C. 1957); *Ching Lan Foo v. Brownell*, 148 F. Supp. 420 (D.D.C. 1957).

¹⁴² See *In the Matter of M*, 5 I. & N. Dec. 472 (1953).

¹⁴³ 66 Stat. 172, 8 U.S.C. § 1101 (f) (1952).

¹⁴⁴ Natives of Canada, South America, and other Western Hemisphere countries are not within

the deportation suspension no matter how meritorious their cases, no matter what their financial condition might be and no matter how great the hardship involved in leaving our shores.¹⁴⁵

6. Finally, aliens may only be granted suspension of deportation where in the opinion of the Attorney General deportation would result in "exceptional and extremely unusual hardship" to the alien, or to his citizen or resident spouse, parent, or child. Thus, as now worded, the long-time resident alien without family ties may no longer secure suspension, and the married alien is obliged to prove that his deportation will result in extremely unusual hardship. This remedy

should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent or child is not sufficient to justify suspension of deportation.¹⁴⁶

Can hardship or even unusual hardship be weighed thus in pounds of heartache or misery on the scales of the blindfolded Goddess of Justice?¹⁴⁷ In the congressional debates on this provision, Representative Zablocki complained:

The requirement to the effect that the applicant, in order to qualify for a suspension, would have to prove that deportation would result in exceptional and extremely unusual hardship to his immediate family, is not only very stringent but encompasses areas which are intangible, difficult to define, and involve an evaluation of the emotional content in any family life. Its operation might result in tragic family separations.¹⁴⁸

President Truman in his veto message¹⁴⁹ observed:

The bill would sharply restrict the present opportunity of citizens and alien residents to save family members from deportation. . . . The bill would prevent . . . discretion from being used in many cases where it is now available, and would narrow the circle of those who can obtain relief from the letter of the law. This is most unfortunate, because the bill, in its other provisions, would impose harsher restrictions and greatly increase the number of cases deserving equitable relief.

Professors Hart and Jaffe of Harvard Law School reacted to the suspension provisions of the 1952 Immigration Act with the declaration that: "Rarely has there been a bolder statement of a national purpose to be cruel."¹⁵⁰

the quotas unless they are Asiatics or chargeable to colonial quotas. See discussion under Point I, *supra*.

¹⁴⁵ 66 Stat. 216, 8 U.S.C. § 1254(b) (1952). They must go abroad, secure a visa and return.

¹⁴⁶ S. REP. NO. 1137, 82d Cong., 2d Sess. 25 (1952).

¹⁴⁷ President Eisenhower, in his letter to Senator Watkins, note 58, *supra*, took cognizance of the complaints that this standard of hardship was not defined. Professor Jaffe of the Harvard Law School remarked that:

. . . the Attorney General is being asked to trade in distinctions of misery and here we have involved the interest of citizens of this country because this man will usually have a wife or children here, and the Attorney General is put in this invidious and administratively undefensible position of making distinctions between extreme and extremely unusual hardship.

1952 HEARINGS BEFORE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 1568.

¹⁴⁸ 98 CONG. REC. 4443 (1952).

¹⁴⁹ H.R. MISC. DOC. NO. 520, 82d Cong., 2d Sess. 7 (1952).

¹⁵⁰ 1952 HEARINGS, *supra* note 147, at 1576.

I question whether any alleged abuses of the previous law warranted this excursion into the realm of harshness and cruelty. In Brazil dependent family ties preclude deportation without any residence requirement or other restrictions.¹⁵¹

The social, moral, and economic consequences of separating families cannot be overlooked. We recognize the sanctity of the marital relationship in every marriage ceremony. Only strong overriding considerations like punishment for crime should warrant separation of husband and wife. One of the underlying intentions of our immigration laws is said to be the preservation of the family unit,¹⁵² but mere lip service is given this consideration in the suspension sections. Banishment and exile from one's family for immigration violations should not turn on so tenuous a reed as the distinction between unusual hardship and extremely unusual hardship, or a trip across the border to Mexico for supper and the other arbitrary innovations inspired by the present statute.

V. THE IDEAL OF CLARITY AND SIMPLICITY

The Immigration and Nationality Act of 1952 has been amended nine times since its enactment.¹⁵³ The Attorney General is seeking further amendments.¹⁵⁴ There are many, including myself, who would rewrite the law in its entirety. It is the longest and most cumbersome statute in the world dealing with immigration and citizenship. From a grammatical point of view it is as poorly written as any law I have ever read.¹⁵⁵ Some of its provisions are clearly unconstitutional.¹⁵⁶ Other provisions are so unwieldy that it is difficult to ascertain their meaning. They spread the welcome mat for lawsuit after lawsuit.

Senator Lehman's executive assistant, Julius Edelstein, aptly stated:

The Story of Creation, the entire account of the making of the Universe — of the firmament and the earth and the waters thereof, and

¹⁵¹ U.N., STUDY ON EXPULSION OF IMMIGRANTS (1955).

¹⁵² H.R. MISC. REP. NO. 1365, 82d Cong., 2d Sess. 29 (1952).

¹⁵³ 67 Stat. 108 (1953), 8 U.S.C. § 1440(a) (Supp. V 1958); 68 Stat. 264 (1954), 8 U.S.C. § 1184(a) (Supp. V 1958); 68 Stat. 495 (1954), 8 U.S.C. § 1438 Supp. V 1958); 68 Stat. 1145 (1954), 8 U.S.C. § 1182(a) (Supp. V 1958); 68 Stat. 1164 (1954), 8 U.S.C. § 1481 (Supp. V 1958); 70 Stat. 50 (1956), 8 U.S.C. § 1401(c) (Supp. V 1958); 70 Stat. 241 (1956), 22 U.S.C. § 1446 (Supp. V 1958); 70 Stat. 575 (1956), 8 U.S.C. §§ 1182(a)(23), 1251(a)(11), 1251(b) (Supp. V 1958); 71 Stat. 643 (1957), 8 U.S.C. §§ 1101(b), 1182(b)-(c), 1201(a), 1205, 1255(a)-(b), (Supp. V 1958).

¹⁵⁴ Letter From Attorney General Brownell to the Speaker of the House of Representatives and the Vice President, Jan. 31, 1957. See also Department of Justice, Press Release, Jan. 31, 1957. The recommendations have been incorporated in bills introduced by Senator Watkins, S. 1006, 85th Cong., 2d Sess. (1958), Congressman Keating, H.R. 11167, 85th Cong., 2d Sess. (1958).

¹⁵⁵ In 1952 HEARINGS BEFORE THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 774 (1952), Professor Rheinstein of the Chicago Law School testified:

May I call your attention to section 202 which I think nobody can understand until he has read it 12 times. If and when a revision of this law is undertaken I hope to goodness somebody will be called in as an expert in English. As it stands now, it is an abomination on the English language. It is even worse than the Code of Internal Revenue.

¹⁵⁶ 66 Stat. 268, 8 U.S.C. § 1481(b) (1952) provides for a conclusive presumption effectuating voluntary expatriation where a dual-national remains in the state of his foreign nationality for ten years. 66 Stat. 260, 8 U.S.C. § 1451(a) (1952) provides for revocation of naturalization for refusal to testify as to alleged subversive activities within ten years after naturalization. The unconstitutionality of these provisions seems clear to me. In addition, the recent decision in *Trop v. Dulles*, 356 U.S. 86 (1958), would seem to spell the invalidation of the expatriation provisions of the 1952 Act based on desertion, draft evasion, and treason. See 66 Stat. 268, 8 U.S.C. §§ 1481(a)(8)-(10) (1952).

of the creatures that inhabit the earth, including man and woman, takes two brief chapters in the Book of Genesis, amounting to exactly 1,428 words.

But the McCarran-Walter Act which establishes the statutory basis for the immigration, visitation, deportation and naturalization policies of the United States could not be compressed into less than four titles, 13 chapters, and 144 sections.¹⁵⁷

Senator Moody remarked:

Why is this legislation labeled as a codification and, therefore, a simplification, when the test of whether admitting an alien is in the public interest appears as subclause (b) of clause (ii) of subparagraph (28) of subsection (a) of section 212 of Chapter I of Title II of Chapter 6 of Title VIII of the United States Code dealing with immigration matters? What is clear or simple about that?¹⁵⁸

Former Attorney General McGranery testified on October 27, 1952, that our immigration laws are complicated by a cumbersome numbering system and numerous ambiguities.¹⁵⁹

The mad Roman tyrant, Caligula, had his laws written in fine print and posted high in the market place. Of course, no one could read them. The cumbersome and ambiguous provisions of the 1952 Act are equally beyond the vision of most lawyers and laymen because they lack clarity and simplicity. For this reason alone, the McCarran-Walter Act should be rewritten. Laws which are ambiguous and cannot be understood are traps for the unwary and pitfalls for the innocent. They are neither just nor fair.

CONCLUSION

The Immigration and Nationality Act of 1952 brought some improvements to our immigration laws.¹⁶⁰ The advances of the act, however, are far outweighed by its shortcomings,¹⁶¹ consisting of repeated failures to incorporate rudimentary concepts of justice and fair play. The 1952 Immigration Act should be completely rewritten to meet the following objections:

1. It does not eliminate race as a bar to immigration as its authors proclaimed.¹⁶² It discriminates by quota provisions upon the basis of race, national origin, and birth in colonial possessions. This deficiency is not in keeping with our foreign policy, our international declarations,

¹⁵⁷ Federal Bar News, June 1956, p. 283. Compare the Canadian Immigration statute of eighty-two sections and the Philippine Immigration Act of fifty-four sections with the McCarran-Walter Act. Other countries boast of more simplified but equally effective immigration laws.

¹⁵⁸ 98 CONG. REC. 5212 (1952).

¹⁵⁹ 1952 HEARINGS, *supra* note 147, at 1350.

¹⁶⁰ Practically no one is denied a quota allocation. But see the case of an Indonesian born Chinese who apparently can secure no quota allocation. The Chinese World, April 14, 1958. Rehabilitated criminals, subversives, and prostitutes who meet certain limited restrictions are permitted to remain here. Persons whose skills will aid our national welfare are granted preferential treatment.

¹⁶¹ President Truman in his veto message stated:

Time and again, examination discloses that the revisions of existing law that would be made by the bill are intended to solidify some restrictive practice of our immigration authorities or to overrule or modify some ameliorative decision of the Supreme Court or other Federal Courts. By and large, the changes that would be made by the bill do not depart from the basically restrictive spirit of our existing law — but intensify and reinforce it.

H.R. Misc. Doc. No. 520, *supra* note 149, at 8.

¹⁶² H.R. REP. NO. 1365, 82d Cong., 2d Sess. 28 (1952).

our traditions, or our aspirations. All existing discriminations contrary to the United Nations Universal Declaration of Human Rights should be eliminated.¹⁶³

2. By subjective standards and provisions which operate *ex post facto*, contain no statute of limitations, and which fail to take account of rehabilitation, an alien is kept in fear of deportation under present law for the rest of his life.¹⁶⁴ The inherent worth of an individual should be controlling under modern immigration laws. Retroactive and *ex post facto* deportation proscriptions should be outlawed as an uncivilized practice unworthy of a great democracy. Objective standards should replace the present subjective guides and a statute of limitations from five to ten years for all deportable offenses should be adopted.¹⁶⁵

3. The Administrative Procedure Act, including its requirement for independent hearing officers, should be an integral part of the immigration process. Confidential information should not be utilized. The procedure requiring confrontation of witnesses and cross-examination which was utilized for some sixty years prior to World War II, without hysterical fears of subversive infiltrations, should be restored in keeping with our Anglo-American concepts of justice and fairness.

4. Adequate consideration for aliens with family ties should be, once again, a respected ideal of our immigration policy. I am opposed to the deportation of an alien who has an American spouse or child. For criminal, immoral, or subversive infractions, he can and should be punished under our criminal laws. There is no need to super-impose the dreaded ban of exile which has been "abandoned by the common consent of all civilized peoples."¹⁶⁶ This is particularly true where the alien's conduct occurred in the remote past and he is presently a person of good moral character.

5. To the foregoing guideposts for a new immigration statute, I would add the requirement that it be written in clear, simple and direct language, so that it might be fully and easily understood by the lawyer, layman, administrator and judge.

Our Immigration and Nationality Act of 1952 is sadly wanting in these major respects. When it is rewritten (and some day it will be) let us hope that it will become a shining exemplification of the universal ideal of justice.

¹⁶³ Point I, *supra*.

¹⁶⁴ Even after naturalization an individual's citizenship is subject to revocation. 66 Stat. 260, 8 U.S.C. § 1451 (1952).

¹⁶⁵ See Maslow, *Recasting Our Deportation Law*, 56 COLUM. L. REV. 325-27 (1956), for a detailed treatment of this proposal.

¹⁶⁶ *United States ex rel. Klonis v. Davis*, 13 F.2d 630 (2d Cir. 1926). The American public was recently shocked to learn that after a deportation battle of eleven years William Heikkila had been bundled off on April 18, 1957 and deported to Finland without any opportunity to say farewell to his American wife or consult his attorney. Heikkila who came here at the age of two and a half months is a product of America. Whatever his shortcomings, it is indeed a barbarous and monstrous law which requires his banishment. Heikkila has been brought back to the United States to continue his deportation fight, and the Immigration Commissioner insists he will again deport Heikkila even if it takes another eleven years. See 104 CONG. REC. 6321 (daily ed. April 23, 1958) (remarks of Congressman Shelley).